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But if the protection of the bank must be worked out in terms of the common law, it seems that it would be simpler, and more in accord with the intent of the parties, to consider that one of the terms of the contract, which is implied between the depositor and the bank from the act of making a deposit,¹⁴ is a promise from the depositor that the bank will be reimbursed if it pays his checks not knowing of his death. This theory would give the bank a right, similar to that of the payee, against the drawer's estate: and it would obviate the necessity either of making exceptions to common law rules, or of calling the check an assignment, contrary to the weight of authority as expressed in the Negotiable Instruments Law,¹⁵ in order to protect banks paying without notice of the drawer's death.

R. E. H.

NUISANCE: LEGISLATIVE AUTHORITY.—In *E. I. Du Pont de Nemours Powder Company v. Dodson*¹ two questions are presented: (1) How far may a state legislature go in legalizing what would otherwise be a nuisance? (2) What is necessary to constitute legislative authority to maintain it? The plaintiffs sued to enjoin the maintenance of dynamite in a magazine on premises immediately adjoining their livestock pasture, four to six hundred yards from their residences, and in a thickly settled community, claiming that it destroyed the market value of their land, as well as rendering their homes unsafe. The defendant pleaded a state statute regulating the business of manufacturing and storing explosives. This law forbade the location of such businesses in certain places, and required a certificate from the state mine inspector approving any location in places not prohibited. Compliance with this statute was alleged and proved. Another statute provided that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." In refusing the injunction for the reason just stated, the court did not deny that the alleged nuisance might have been enjoined but for the statutes, nor that damages might be recovered in spite of the statutes. It was also admitted that legislative authority could not be pleaded unless the legislature clearly contemplated the precise act complained of.

The ordinary case in which a legislature may authorize the doing of an act which would otherwise be a nuisance is that of a grant to a public utility, the most common example being that of power given to a railroad. In such cases the public benefit derived from its operation will outweigh private inconvenience therefrom. But

¹⁴ *Levine v. State Bank* (1913), 141 N. Y. Supp. 596, 80 Misc. Rep. 524; *Kloepper v. First National Bank of Herington* (1902), 65 Kan. 774, 70 Pac. 880.

¹⁵ Negotiable Instruments Law, § 189.

¹ (Okla., May 4, 1915), 150 Pac. 1085, rehearing denied, Aug. 13, 1915.

this rule is subject to qualifications. Except for merely incidental injuries, where the public benefit is very great in comparison with the private annoyance, an action for damages will lie.² And, to avoid abatement, it must be shown that the legislature plainly contemplated, and intended to authorize the specific act committed.³ Unless the injury complained of is the necessary result of the power given, an injunction will ordinarily be granted.⁴ The principal case was decided upon the ground that the legislature had authorized the precise act of the defendant.

But the case in which a legislature grants to a public utility privileges which, but for the paramount benefit to the public, would infringe private rights, is clearly distinguishable from the case where a legislature, by exercising its police power, regulates the operation of a business in order to prevent the infringement of the rights of others—in order to prevent, for instance, the maintenance of nuisances. In the one situation the legislative power is exercised for the public benefit through the business of a corporation or an individual; in the other it is exercised against the business in order to protect the rights of the public and of individuals. It is submitted that the legislature of Oklahoma in thus regulating a purely private business—in telling the defendant where it could *not* go except for the mine inspector's certificate—should not be held to have intended to authorize the maintenance of a nuisance in those places from which the statute did not exclude the business.

H. E. A.

PROPERTY: ADVERSE POSSESSION OF RAILROAD RIGHT OF WAY.—In *Central Pacific Railway Company v. Droge*,¹ it was held that an individual could not acquire title by adverse possession to any part of the four hundred foot right of way granted by Congress to the plaintiff's predecessor. The decision follows the rule laid down by the United States Supreme Court,² that the grant of this strip was a conclusive determination by Congress that it was necessary for railroad purposes, and that the grant was only of a qualified fee, which would revert to the United States should the grantee attempt to use the land for other than railroad purposes. Since the road could not grant any part of the way directly, it could not do so indirectly, and, therefore, adverse possession, which rests on a presumed grant, would give no title.

² Wood, Law of Nuisances, §§ 750, 752.

³ *Payne v. Town of Wayland* (1906), 131 Iowa, 659, 109 N. W. 203; Wood, Law of Nuisances, §§ 746, 750, 751, 754. See also 3 California Law Review, 503.

⁴ *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church* (1883), 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. Rep. 719; Wood, Law of Nuisances, § 746.

¹ (Aug. 31, 1915), 50 Cal. Dec. 277, 151 Pac. 663.

² *Northern Pac. Ry. Co. v. Townsend* (1903), 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671.